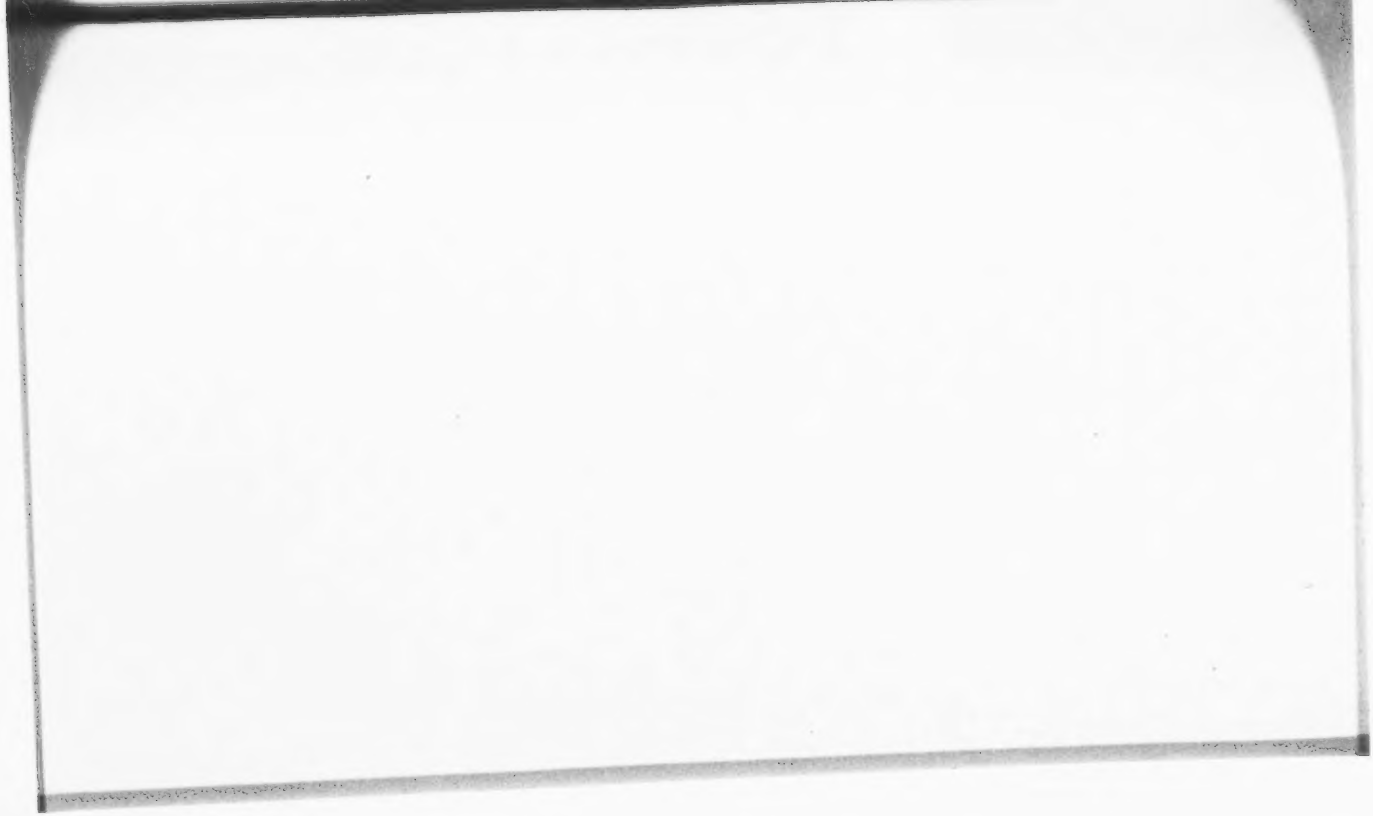

No. 158 23

Reply Brf. of Disbee, Fleming & Fleming for Appellees

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JAMES H. McKE

In the Supreme Court of the United States,

OCTOBER TERM, A. D. 1899.

HENRY L. MITCHELL, GOVERNOR, *et al.*, Trustees of the Internal Improvement Fund of Florida, *et al.*, Appellants,

vs.

CHARLES M. FURMAN, as Administrator, *et al.*, Appellees.

NO. 158.

REPLY TO BRIEF OF COUNSEL FOR APPELLANTS ON MOTION TO DISMISS.

The report of the case of Muse *vs.* Arlington Hotel Co., 168 U. S., 430, in connection with the opinion of the Court below, reported 68 Fed. Rep., 637, shows that every ground, upon which the jurisdiction of this Court is invoked by appeal in the present case, is untenable; but we shall consider shortly the various grounds stated by counsel for appellants in his brief upon the motion to dismiss, which he relies upon to sustain the jurisdiction of this Court.

These grounds are five in number, *viz*:

a. Estoppel by the allegations of the pleadings.

b. That the allegations of the bill did not show a complete and perfect grant by the Spanish Government.

c. That the demurrer to the jurisdiction raised questions involving the construction of the treaty.

d. That the question of the authority of Morales to make the grant involved the construction of the treaty.

e. That the constitutionality of a law of the United States was involved because appellees contended that the Act of May 23, 1828, if by its terms applicable to complete grants, was unconstitutional.

A.

Estoppel by the Pleadings.

Jurisdiction in the Federal Courts cannot be predicated upon the allegation of a legal conclusion. The question of the jurisdiction of this Court is the first and fundamental one to be determined upon every writ of error or appeal, and must be determined by the Court for itself, without regard to the position of the parties in reference thereto.

R'y. Co. *vs.* Swan, 111 U. S., 379.

Ayers *vs.* Watson, 113 U. S., 594.

Parker *vs.* Ormsby, 141 U. S., 81.

Allegations that a cause arises under the Constitution or Laws or Treaties of the United States will not give jurisdiction, where the facts appearing show that the claim is not in reality based thereon.

Robinson *vs.* Anderson, 121 U. S., 522.

Muse *vs.* Hotel Co., *supra.*

There is nothing in this ground upon which to base jurisdiction.

B.

Contention that the bill did not show a complete and perfect grant.

A determination as to whether or not the bill showed a complete and perfect grant could not involve the construction of the treaty.

Muse *vs.* Hotel Co., *supra.*

Borgmeyer *vs.* Idler, 159 U. S., 408.

California Powder Works *vs.* Davis, 151 U.S., 389

Phillips *vs.* Mound City Assoc'n, 124 U. S., 605.

Kennedy *vs.* Hunt, 7 Howard, text 593-594.

McDough *vs.* Millaudon, 3 Howard, 693.

C.

Contention that demurrer to the jurisdiction involved the construction of the treaty.

Under this head appellants contend that the construction of the treaty was involved on these grounds:

(1) A determination of the applicability of the Act of 1828 was required.

(2) That the title had not been recognized by the United States.

(3) That it appeared that the title derived from Spain had never been recorded under the laws of the United States.

(4) That the title must be determined by the political department of the United States.

(5) That the treaty with Spain granted the lands to the United States.

(1)

A determination of the applicability of the Act of 1828 did not involve the construction of the treaty.

Muse *vs.* Hotel Co., *supra.*

(2), (3) & (4).

All these questions had nothing whatever to do with the treaty, or construction of the treaty. They related merely to the validity of the complainants' title, considered with reference to the laws of the United States, *as distinct from the treaty*, and the Court in passing thereon was not required to determine either the validity or construction of the treaty.

(5)

The treaty with Spain did not grant the lands to the United States, if they had formerly been the subject-matter of a complete grant by the Spanish government to the complainants' ancestor, through whom they claimed to derive title; and this construction is not a subject of controversy.

U. S. *vs.* Arredondo, 6 Peters, text 735.

U. S. *vs.* Perchman, 7 Peters, 51.

U. S. *vs.* Wiggins, 14 Peters, 334.

Doe *vs.* Eslava, 9 Howard, text 445.

A determination whether or not the treaty granted the lands to the United States involved simply the question whether there had or had not been a prior valid and complete grant by the Spanish government, and this in no way put the validity or construction of the treaty in issue.

Muse *vs.* Hotel Co., *supra*.

D.

Contention that the authority of Morales to make the grant involved a construction of the treaty.

The basis for this contention is that the grant was made by Morales, who, according to the finding of the master, confirmed by the Court, was acting at the time as political and military governor of the province of East Florida, owing to the illness of Quesada, then governor. (Record, page 53). A determination whether or not the grant was valid, and thus stood ratified and confirmed by the treaty, did not draw in question the construction of the treaty; and the question whether or not Morales had power, by virtue of his office, to make the grant was solely one of fact, in no way dependent upon, or involving, the construction of the treaty. In determining the question the Court merely ascertained and declared that the grant fell within the category to which the provision of the treaty applied.

Muse *vs.* Hotel Co., *supra*, text 437.

E.

Contention that there was jurisdiction because appellees contended that the limitation in the Act of 1828, if applicable to complete grants, was unconstitutional.

Under this contention appellants seek to maintain the jurisdiction of this Court, independently of the construction of the treaty, on the ground that the constitutionality of a law of the United States was drawn in question. It is difficult to perceive how this Court can have jurisdiction, at the instance of the present appellants, on the ground that if the Court below had decided in their favor it would necessarily have passed on the constitutionality of a law of the United States, when in fact that question was neither decided by the Court, nor necessarily involved in its judgment, which proceeded on the ground that, *as a matter of construction*, the law was not applicable. (Record, page 63.)

Muse *vs.* Hotel Co., *supra*, and cases there cited.

Ansboro *vs.* United States, 159 U. S., 695.

Carey *vs.* Ry. Co., 150 U. S., 170.

In re Lennon, 150 U. S., 393.

Borgmeyer *vs.* Idler, 159 U. S., *supra*.

Respectfully submitted,

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